

### REMARKS

Applicants respectfully request entry of the amendments and remarks submitted herein. Claims 1-8 and 10-13 have been amended herein; claims 14 and 15 have been canceled herein without prejudice to continued prosecution; and new claims 18-20 have been added herein. Support for the amendments and the new claims can be found throughout the specification and in the originally filed claims.

Claims 1-13 and 16-20 are currently pending. Reconsideration of the pending application and claims is respectfully requested.

### Claim Objections

Claim 11 is objected to because the presence of a comma between “pizza-like” and “products” appears to be a typographical error. Applicants have amended claim 11 to remove the comma. In view of this amendment, Applicants respectfully request that the objection to claim 11 be withdrawn.

### The 35 U.S.C. §112 Rejections

Claims 1-17 stand rejected under 35 U.S.C. §112, second paragraph, as the Examiner asserted that those claims are indefinite for failing to particularly point out and distinctly claim the subject matter that Applicants regard as the invention.

According to the Examiner, it is unclear in claim 1 how mixtures (B), (C) and (D) relate to dry mix (A), and it is also unclear how a dry mix can be described as having a particular freeze-thaw stability, baking stability, and viscosity. Applicants note that claim 1 describes how to measure the freeze-thaw stability, the baking stability, and the viscosity of dry mix (A). By way of explanation, dry mix (A) is wetted with 36% water to obtain mixture (B), which is then used to measure freeze-thaw stability; dry mix (A) is wetted with 21% water to obtain mixture (C), which is then used to measure baking stability; or dry mix (A) is wetted with 31% water to obtain mixture (D), which is then used to measure viscosity. Therefore, the parameters (i.e., freeze-thaw stability, baking stability, and viscosity) are measured using mixtures (B), (C), and (D), but are all reflective of the dry mix (A).

Also according to the Examiner, the term “characterized” in claims 2-8 and 10-13 renders the claims indefinite because it is unclear whether the limitations following the phrase “characterized in that” are required or optional. Applicants have herein amended claims 2-8 and 10-13 to change “characterized in that” to “wherein”. Applicants believe the claims are clear and are not indefinite.

In addition, the Examiner asserted that the use of “preferably” in claim 6 renders the claim indefinite. Applicants have herein amended claim 6 to remove the limitation associated with the use of “preferably”. Applicants note that this limitation was introduced as new claim 18.

Further, the Examiner asserted that claim 11 is unclear because of the phrase “pizza-like” products. Applicants respectfully disagree and submit that “pizza-like products” are well known in the art and the use of “pizza-like products” is not indefinite.

Finally, the Examiner asserted that claims 14 and 15 merely recite a use without any active, positive steps delimiting the use. Applicants have herein canceled claims 14 and 15 and re-written them as new composition claims 19 and 20, respectively.

In view of the amendments and remarks herein, Applicants respectfully request that the rejections of claims 1-17 under 35 U.S.C. §112, second paragraph, be withdrawn.

#### The 35 U.S.C. §101 Rejections

Claims 14 and 15 stand rejected under 35 U.S.C. §101 because, according to the Examiner, those claims are improper process claims under 35 U.S.C. §101.

Applicants have herein canceled claims 14 and 15 without prejudice to continued prosecution. Accordingly, Applicants submit that the rejection of claims 14 and 15 under 35 U.S.C. §101 is moot.

#### The 35 U.S.C. §103 Rejections

Claims 1-17 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Fazzina et al. (U.S. Patent No. 3,852,501) in view of Suderman (U.S. Patent No. 4,588,600) and further in view of Evans et al. (U.S. Patent No. 4,208,442). According to the Examiner, it would have been obvious to one of ordinary skill in the art at the time of the invention to include wheat

gluten as taught by Suderman in the dry mix of Fazzina et al., because Suderman teaches that the combination of flour and vital wheat gluten in the dry mix contribute to produce a coating that forms a substantially continuous film or envelope that closely resembles a fried food product. According to the Examiner, Evans teaches using modified starch (1-octenyl succinic anhydride) to produce a coating having a crisp texture and taste. Applicants respectfully traverse this rejection.

Fazzina et al. describes a powdered coating composition for imparting a fried structure, appearance and taste to baked foodstuffs. Fazzina et al. teaches a powdered, flowable form that can be readily applied to the foodstuff (e.g., wetted foodstuff such as meats (e.g., chicken and pork)) and is not prepared in batter form (see, for example, column 1, line 45 and line 61). Similarly, Suderman describes a dry premix composition for imparting a fried appearance to baked foods. A batter can be made from the dry premix of Suderman, which, when applied to the surface of a food item such as chicken, fish or vegetables and the food item baked, provides the taste, appearance and texture of a batter-coated deep or pan fried food item. Likewise, Evans et al. describes a dry coating composition used to coat a moistened fowl, which, upon baking, imparts the resultant fowl with a crisp, uniform and adherent coating which has the taste, texture and appearance of a fried coating. Each of the compositions disclosed by Fazzina et al., Suderman, and Evans et al. are typical batter compositions that are used to coat primarily meat products so as to give a baked food product the texture and taste of a fried food product.

On the other hand, the currently claimed composition is not a batter for coating a food product as Fazzina et al., Suderman and Evans et al. all teach. The claimed composition is a dry mix (A) that can be used as a spread or a filling for baked, fried, uncooked savory products, and/or sweet tasting products. The currently claimed composition is multi-purpose and, therefore, exhibits baking stability. However, the currently claimed composition can be used without baking.

As the Supreme Court recently clarified, “rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” (*KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (2007), quoting *In re Kahn*, 441 F.3d 997, 988 (Fed. Cir. 2006)). The Supreme Court urged that “this analysis should be made explicit” (*Id*) and warned that a

“factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning” (*KSR* at 1742). The Supreme Court stated that “a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.” *KSR* at 1741. In the present case, a reference was identified that discloses some of the ingredients and another reference was identified that discloses other ingredients. However, both references disclose products for a completely different application within the art. In the absence of an explicit reason to combine select ingredients from two references in a different field, the rejection appears to be based on improper hindsight analysis.

In view of the amendments and remarks herein, Applicants respectfully request that the rejection of claims 1-17 under 35 U.S.C. §103(a) be withdrawn.

Claim 6 stands rejected under 35 U.S.C. §103(a) as being unpatentable over Fazzina et al. in view of Suderman and Evans et al. and further in view of Kettlitz et al. (US Patent No. 6,235,894). Kettlitz et al. specifically discloses stabilized starch n-octenyl succinate. This rejection is respectfully traversed.

As indicated herein, independent claims 1 and 11 are not obvious over the cited references. Therefore, dependent claim 6 also is nonobvious. “Dependent claims are nonobvious under section 103 if the independent claims from which they depend are nonobvious.” *In re Fine*, 837 F.2d 1071 (C.A. Fed. 1988), citing *Hartness Int'l, Inc. v. Simplimatic Eng'g Co.*, 819 F.2d 1100, 1108, 2 USPQ2d 1826, 1831 (Fed.Cir.1987); *In re Abele*, 684 F.2d 902, 910, 214 USPQ 682, 689 (CCPA 1982); and *In re Sernaker*, 702 F.2d 989, 991, 217 USPQ 1, 3 (Fed.Cir.1983).

In view of the remarks herein, Applicants respectfully request that the rejection of claim 6 under 35 U.S.C. §103(a) be withdrawn.

#### CONCLUSION

Applicants respectfully request allowance of claims 1-13 and 16-20. Please apply any other charges or credits to Deposit Account No. 06-1050.

Applicant : Frans Johan Sarneel et al.  
Serial No. : 10/550,936  
Filed : September 28, 2005  
Page : 9 of 9

Attorney's Docket No.: 19790-0003US1 / CER03-0009

Respectfully submitted,

/June 3, 2009/

/M. Angela Parsons/

Date: \_\_\_\_\_

\_\_\_\_\_  
M. Angela Parsons, Ph.D.  
Reg. No. 44,282

Fish & Richardson P.C.  
3200 RBC Plaza  
60 South Sixth Street  
Minneapolis, Minnesota 55402  
Telephone: (612) 335-5070  
Facsimile: (877) 769-7945

60562843.doc